Menteri Hal Ehwal Dalam Negeri & Anor v Lee Gee Lam and another application

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NOS 05-18-93 AND 05-19-93
GUNN CHIT TUAN CJ (MALAYA), MOHAMED AZMI SCJ AND LC VOHRAH J
15 OCTOBER 1993

Constitutional Law *— Preventive detention — Detention of accused under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 — Detention order stated grounds for detention in the alternative — Whether order proper — Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 4(1)*

Criminal Procedure *— Habeas corpus — Preventive detention — Accused detained under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 — Detention order stated grounds for detention in the alternative — Whether Minister addressed his mind to the relevant limb of s 4(1) — Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 4(1)*

The respondents had been detained under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') pursuant to separate detention orders made by the Deputy Minister for Home Affairs under s 4(1) of the Ordinance. The orders stated the grounds for detention in the alternative. The respondents' applications to the High Court for habeas corpus were allowed on the ground that the orders were defective due to non-compliance with the provisions of s 4(1) of the Ordinance, in that the orders were vague as to which limb of s 4(1) the respondents had been detained under. [See [1993] 3 MLJ 265.]

The appellants appealed, contending that: (i) since the grounds for detention in the two orders were an exact reproduction of the words found in s 4(1), with the preposition 'or' distinguishing the ground relating to public order under the first limb from that relating to suppression of violence under the second limb, it did not matter whether the detention was made on the first ground or the second, as it was not a question of procedure but of substance, which came solely within the subjective discretion of the Deputy Minister; and (ii) the judge should have treated one of the grounds as immaterial surplusage without having the effect of invalidating the order.

Held, dismissing the appeals:

(1) The learned judicial commissioner was correct in allowing the respondents' applications for habeas corpus because, on the face of it, the order was vague as to whether the Deputy Minister had actually applied his mind to the particular circumstances of each respondent's case or whether he had exercised his power of detention mechanically.

(2) The determination of the question as to whether the Deputy Minister addressed his mind to the relevant limb or for that matter to both the limbs, in making his detention order, is a procedural matter and if it is shown that there is some doubt as to which particular limb the Deputy Minister applied his mind to, or whether he applied his mind to both the limbs together in grounding his order, the benefit of the doubt must be given to the detenu.

[Bahasa Malaysia summary

Responden telah ditahan di bawah Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 ('Ordinan itu') menurut dua perintah tahanan berasingan yang dibuat oleh Timbalan Menteri Hal Ehwal Dalam Negeri di bawah s 4(1) Ordinan itu. Perintah itu menyatakan alasan tahanan secara alternatif. Permohonan responden ke Mahkamah Tinggi untuk habeas corpus telah dibenarkan atas alasan bahawa perintah itu cacat kerana ketidakpatuhan dengan peruntukan s 4(1) Ordinan itu, iaitu perintah itu tidak jelas mengenai cabang yang mana di bawah s 4(1) responden telah ditahan. [Lihat [1993] 3 MLJ 265.]

Perayu telah membuat rayuan, dengan menegaskan bahawa: (i) oleh kerana alasan tahanan di dalam kedua-dua perintah itu adalah suatu hasil semula tepat perkataan yang terdapat di dalam s 4(1), dengan kata depan 'atau' membezakan alasan berkenaan dengan ketenteraman awam di bawah cabang pertama daripada yang berkenaan dengan penyekatan kekerasan di bawah cabang kedua, ia tidak penting sama ada tahanan itu dibuat di bawah cabang pertama atau kedua, kerana ia bukannya suatu soalan mengenai prosedur tetapi mengenai substans, yang terletak tunggal di bawah budi bicara subjektif Timbalan Menteri; dan (ii) hakim sepatutnya menyifatkan salah satu daripada alasan itu sebagai alasan berlebihan tanpa mempunyai kesan mentaksahkan perintah itu.

Diputuskan, menolak rayuan itu:

(1) Pesuruhjaya kehakiman yang arif bertindak secara betul apabila membenarkan permohonan responden untuk habeas corpus kerana, pada mukanya, perintah itu tidak jelas sama ada Timbalan Menteri telah menumpukan fikirannya kepada keadaan tertentu kes setiap responden ataupun sama ada beliau telah menggunakan kuasa tahanannya secara mekanik.

(2) Pemutusan soalan sama ada Timbalan Menteri telah menumpukan fikirannya kepada cabang relevan ataupun kepada kedua-dua cabang, apabila membuat perintah tahanan itu, adalah suatu perkara prosedur dan jika ia ditunjukkan bahawa terdapat keraguan mengenai cabang yang mana satu Timbalan Menteri itu telah menumpukan fikirannya terhadap, atau sama ada beliau menumpukan fikirannya kepada kedua-dua cabang itu apabila

membuat perintah itu, faedah keraguan itu mesti diberikan kepada orang yang ditahan.]

Notes

For cases on detention under the Emergency (Public Order and Prevention of Crime) Ordinance 1969, see 4 *Mallal's Digest* (4th Ed) paras 222–227.

For cases relating to preventive detention and the application for habeas corpus, see 5 *Mallal's Digest* (4th Ed) paras 1269–1277.

Cases referred to

1 *Lim Thian Hok v Minister of Home Affairs & Anor and other applications* [1993] 1 MLJ 214 (folld)

2 *Puvaneswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1991] 3 MLJ 28 (folld)

3 *Poh Chin Kay v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other apppeals* [1990] 2 MLJ 297 (folld)

Legislation referred to

Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 4(1)

Appeal from: Criminal Application No 44–10–93 (High Court, Penang)

Dato' Hamid Embong (Senior Federal Counsel) and *Mahmud Abdullah* (Federal Counsel) for the appellant.

Karpal Singh (*Karpal Singh & Co*) for the respondents.

LC Vohrah J (delivering the grounds of decision of the court): These were two identical appeals against the decision of the learned Vincent Ng JC in allowing the respondents' applications for habeas corpus on the common ground that the respective orders issued by the Deputy Minister of Home Affairs for the detention of the respondents were defective due to non-compliance with the provisions of s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance').

The order in respect of each of the respondents was made by the Deputy Minister on the same day in identical terms on almost similar facts. Each of the two orders was in the following terms:

> Bahawasanya saya, Menteri Dalam Negeri, berpuas hati yang perintah ini adalah perlu dibuat ke atas orang yang namanya tersebut di bawah ini dengan tujuan hendak mencegah beliau daripada melakukan perbuatan dengan apa-apa cara yang memudaratkan ketenteraman awam atau untuk menghapuskan kekerasan atau mencegah jenayah yang melibatkan kekerasan.
>
> Nama — Nombor kad pengenalan
> [x] — [x]
>
> Oleh yang demikian, pada menjalankan kuasa yang diberi kepada saya di bawah s 4(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969,

maka saya mengarahkan dengan perintah ini supaya orang yang namanya tersebut di atas ditahan selama dua tahun mulai dari 22 April 1992 di Pusat Pemulihan Akhlak, Pulau Jerejak, Pulau Pinang atau di mana-mana tempat lain sebagaimana yang di arah dari semasa ke semasa.

Ditandatangani pada 22 April 1992.
—tt—
(Dato' Megat Junid bin Megat Ayob)
Timbalan Menteri Dalam Negeri
Malaysia

Section 4(1) of the Ordinance is worded as follows:

If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order (hereinafter referred to as a 'detention order') directing that that person be detained for any period not exceeding two years.

The learned judicial commissioner in allowing the two applications for habeas corpus adopted the reasons he gave in a previous hearing when he considered 11 criminal applications jointly, namely, *Lim Thian Hok v Minister of Home Affairs & Anor and other applications*[1] wherein he stated (at p 219):

... it seems quite clear to me that what is intended in s 4(1) of the Ordinance is to confer on the Minister the power to issue a detention order based on any one of two grounds which, by its very nature of expression, should be read disjunctively.

The first limb of the section seeks to allow the Minister to detain:

(a) a person who has acted in any manner prejudicial to public order (or, presumably social order in our society), which encompasses a whole gamut of variegated offences such as smuggling, running illegal lotteries, preaching religious heresy, or advocating communist or racist ideology, all of which do not necessarily involve violence; and

The second limb allows the Minister to detain:

(b) a person, if it is necessary for the suppression of violence or the prevention of crimes involving violence, obviously an appropriate provision for curbing gangsterism, gangland warfare and gang violence — which necessarily involve violence or the use of violence, as emphasized in the second limb.

Furthermore, the interpolation in s 4(1) of the Ordinance, of the following words (underscored by me) '... it is *necessary that that person should be detained* or that it is necessary for ... *that that person should be detained* ...' (seemingly repetitive) shows a clear recognition by the legislature of the distinction between the first limb and second limb of the said section.

The two above grounds for detention in (a) and (b) are so distinct and different in specie one to the other, that reading them conjunctively does not make for grammatical sense or consistency in the flow of the language ... There being nothing in the Ordinance requiring that the detention order should be in any particular form, the order should be so worded as to show, at least on its face, under which particular limb of s 4(1) the detenu is being detained.

> Compliance with this essential and mandatory procedure is necessary in order to dispel the view that the order was vague or was passed mechanically by merely reproducing the language of s 4(1) of the Ordinance. Such matters are subject to the scrutiny of the courts though, it is settled that once ground (a) or (b) (or even both with the conjunction 'and' used) is selected by the Minister, his subjective satisfaction as to manner of such selection and the allegations of fact to back-up the same is beyond question by the courts by virtue of s 7C of the Ordinance (s 11C of the Act).

Before us the learned senior federal counsel for the appellants whilst conceding that there are two limbs to s 4(1), challenged the decision of the learned judicial commissioner by arguing that since the grounds for the detention in the two detention orders were the reproduction of the exact words found in s 4(1) with the use of the preposition 'or' distinguishing the ground relating to public order under the first limb from that relating to suppression of violence under the second limb, it should not have mattered whether the detention was made on the first ground or the second ground because (if we understood him correctly) the grounds upon which the detention was made constituted not a question of procedure but a question of substance which came solely within the subjective discretion of the Deputy Minister. In any event, he argued, the learned judicial commissioner should have treated one of the grounds as immaterial surplusage without having the effect of invalidating the order.

In this regard, we were alerted by counsel for the respondents to a well-considered judgment of the High Court, *Puvaneswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor*,[2] wherein Edgar Joseph Jr J (as he then was), in allowing the detenu's application for habeas corpus had this to say (at pp 29–30):

> There had been a consistent current of judicial opinion in our courts, including the latest decisions of the Supreme Court, which indicate that when confronted with the problem of interpreting powers of preventive detention, they have interpreted them strictly so as to require that the provisions of the relevant statute are rigidly and meticulously complied with. (See for example, *Tan Hoon Seng v Minister for Home Affairs, Malaysia & Anor* [1990] 1 MLJ 171, *Rajoo s/o Ramasamy v Inspector General of Police & Ors* [1990] 2 MLJ 87, and a series of 11 recent appeals heard together, the first being *Poh Chin Kay v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1990] 2 MLJ 297, in all of which the detainee succeeded on purely procedural or technical grounds.)

We were of the view that the above observations of the learned judicial commissioner and those of the learned judge reflect the correct attitude of the courts in interpreting provisions relating to the exercise of the power of detention without a trial. The learned judicial commissioner was correct in allowing the respondents' applications for habeas corpus because, on the face of it the order was vague as to whether the Deputy Minister had actually applied his mind to the particular circumstances of each respondent's case or whether he had exercised his power of detention mechanically. As was stated by this court in the case of *Poh Chin Kay v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other appeals*[3] at p 299:

> ... The power to detain a person without trial cannot be exercised by inference. The power must be expressed, clear and unequivocal. Where detention law and the liberty of the individuals (sic) are concerned, this is the most correct approach for the courts to apply. There is hardly any need to repeat what has been said on the principle to be followed by the courts in dealing with detention law. The principle was emphasized in *Re Tan Boon Liat @ Allen & Anor* [1977] 2 MLJ 108 at p 114 reiterated by this court in *PP v Koh Yoke Koon* [1988] 2 MLJ 301 and *Tan Hoon Seng v Minister of Home Affairs, Malaysia & Anor* [1990] 1 MLJ 171.

We would conclude by saying that in determining the propriety or legality of a detention order made under s 4(1) the satisfaction of the Minister has to be considered in the light of the limbs under which he acted. The determination of the question as to whether he addressed his mind to the relevant limb or for that matter to both the limbs in making his detention order is a procedural matter and if it is shown that there is some doubt as to which particular limb the Minister applied his mind to or whether he applied his mind to both the limbs together in grounding his order, the benefit of the doubt must be given to the detenu.

For the above reasons, the two appeals had to be dismissed.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim